No. 97-1192

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SWIDLER & BERLIN AND JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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Introduction

Defending the Court of Appeals decision, Independent Counsel asserts, as did that court (over Judge Tatel's compelling dissent), that the new rule it announced will not chill attorney-client communications. Four major attorney organizations that have filed amicus briefs—the American Bar Association, the American College of Trial Lawyers, The National Association of Criminal Defense Lawyers, and the American Corporate Counsel Association—strongly disagree. These organizations rely not on the views of commentators—as does the Court of Appeals' majority and Independent Counsel—but on the innumerable experiences of thousands of their members, which confirm that the majority's new rule would have a pronounced chilling effect.

The National Hospice Organization also has filed an amicus brief. The members of this organization reason—as does the ABA's Commission on Legal Problems of the Elderly, which supports the ABA's brief—that the majority's opinion effectively discriminates against persons who, anticipating death, wish to consult a lawyer in confidence about criminal matters.

The reason and experience these knowledgeable groups bring to the issue are significant. Federal Rule of Evidence 501 mandates that application of the attorney-client privilege "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." Except for a brief citation in "Questions Presented," Independent Counsel ignores this rule. This disregard is not surprising, because the position Independent Counsel supports wars with the experience of seasoned, practicing lawyers. It also conflicts with the reason and experience reflected in virtually all non-testamentary state decisions on the issue, and the twenty-six state statutes which recognize that the privilege survives death. None of these decisions or statutes makes any distinction between civil and criminal matters. As this Court said in *Jaffee v. Redmond*, 116 S.Ct. 1923, 1930 (1996), "it is

appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both 'reason' and 'experience'."

Independent Counsel ignores this passage from *Jaffee*—indeed, he does not even cite the case—just as he overlooks *Jaffee*'s emphasis on the importance of uniformity between federal and state decisions on privileges issues.[1] He further disregards *Jaffee*'s admonition that "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of [a person's] interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Id.* at 1932. This, of course, is precisely the effect of the after-the-fact balancing test announced by the Court of Appeals' majority, which also is condemned by the observation in *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) that "[a]n uncertain privilege . . . is little better than no privilege at all."

Attorney-Client Issue

1. Independent Counsel argues that the issue of posthumous disclosure of client communications in criminal cases is "novel[]" and "narrow." Br. at 7. But the issue is not that "novel." Seven states have held that the privilege survives death in criminal cases.[2] A federal court of appeals (in two cases) and at least 13 state courts have held in civil cases that the privilege survives death, with no suggestion that criminal cases require a contrary rule.[3] Nor is the issue "novel" in the commentaries, which all concede that under the common-law rule—whatever its wisdom (an issue on which commentators

[1] Otherwise "any State's promise of confidentiality would have little value." *Jaffee*, 116 S.Ct. at 1930.

[2] The cases are cited in the Petition at 10 n.4.

[3] The cases are cited in the Petition at 10 ns.5 and 6. And there are dicta to this effect in other cases, including federal cases. See Petition at 13 n.12.

split)—the privilege survives death, with no hint that criminal cases are different.

However, the case is "novel" in the sense that, contrary to this Court's admonitions, the lower court adopted a balancing test for an "absolute" privilege. It is especially novel because *no one* (not even the commentators on which Independent Counsel relies) ever has suggested, prior to this case, that it would be rational to bar disclosure of privileged conversations in civil cases after the client's death, but not in criminal cases where the potential consequences are much more severe. And the case is "novel" because the court below has created a new and irrational exception to a well-established rule. Because the rule is important to our legal system and the proposed exception has no rational basis, such "novelty" should argue for, not bar, review.

Nor is the decision below "narrow," even if limited to criminal cases. Innumerable attorney-client discussions involving potential criminal implications occur daily. The decision below affects those conversations, particularly where the client is elderly, ill, or otherwise anticipates death in the near future. Under the decision below, for example, persons who are elderly or seriously ill cannot talk to an attorney in confidence about a child whom they suspect may be dealing in drugs. A decision having an immediate and significant impact on a broad range of everyday occurrences is not "narrow."

2. Echoing the majority (Pet. App. 6a), Independent Counsel says that, after the client dies, "neither the client nor the client's estate is subject to liability" in a criminal proceeding. Br. at 11 n.3. That statement is wrong, for a client's estate may be decimated as a result of criminal proceedings after his or her death. For example, a child's drug activities could lead to civil forfeiture of estate property. *See, United States v. One Parcel of Property at 31-33 York St.*, 930 F.2d 139 (2d Cir. 1991); *cf. Bennis v. Michigan*, 516 U.S. 442 (1996). Moreover, disclosure could cause investigation, prosecution, or conviction of an

be so much more injurious than in civil proceedings, *non-disclosure* follows *a fortiori* from the rule that posthumous disclosure is not allowed in civil cases.

5. Citing *State v. Gause* 489 P.2d 830 (Ariz. 1971) and *State* v. *Kump*, 301 P.2d 808 (Wyo. 1956), Independent Counsel suggests (Br. at 9) that these two cases hold, as a general proposition, that "the privilege does not apply after death." This is not so; those cases held that, in the circumstances involved, a husband accused of murdering his wife could not assert her attorney-client privilege where he either had a conflict of interest or lacked authority.[7] Here Independent Counsel does not question the authority of Mr. Hamilton (who also represents the Foster family) to assert the privilege. In so doing, Mr. Hamilton is not only carrying out the intent of Mr. Foster and his family, but also is fulfilling his ethical obligation to protect confidential client disclosures.[8]

The *Gause* and *Kump* cases are significant (as is the *Magraw* case cited in n.7) because they demonstrate that courts will find acceptable means to deal with unjust situations without doing harm to the attorney-client privilege. So also, in the circumstance when a criminal *defendant's* constitutional right to a fair trial is affected by application of the privilege, a court might find a limited solution.[9] But this is not this case. Here a *prosecutor*, not a criminal defendant, seeks to violate the privilege.[10] The

[7] *See State v. Gause, supra,* 489 P.2d at 834: "Where such a conflict of interest existed . . . the privilege could not be claimed." *See also District Attorney v. Magraw,* 628 N.E.2d 24 (Mass. 1994) (where husband accused of murdering his wife is her executor and refuses to waive her attorney-client and psychotherapist-patient privileges, district attorney may petition the probate court to remove him on ground that he cannot make a disinterested waiver decision).

[8] *See Restatement (Third) of the Law Governing Lawyers* (March 29, 1996) § 127 comment c: "A lawyer for a client who has died has a continuing obligation to assert the privilege."

[9] *See* Petition at 12.

[10] To allow a prosecutor to do so in the name of a grand jury's constitutional right to investigate would throw open the flood gates.

Court can decide this case without reaching the issue of a defendant's constitutional rights. A ruling here for Petitioners will not produce the parade of horribles conjured up by Independent Counsel. But real harm looms to the privilege—and to the administration of justice that depends on lawyers' obtaining the unvarnished truth from their clients—if the lower court decision is allowed to stand.

6. Independent Counsel disputes that the new rule will make clients less willing to confide in their attorneys. His reasoning is curious; he states that the client's interest in his reputation and in protecting his family and associates cannot justify non-disclosure after death because it does not justify non-disclosure before death. This is so, he says, because the living client must testify truthfully (perhaps under grant of immunity) and the lawyer must disclose his client's deception if he does not.

This argument attacks the basic concept of the privilege—that it permits the client to impart information to his attorney in confidence. By suggesting that the information provided to attorneys necessarily will be disclosed, even if the client lives, Independent Counsel in effect contends that the privilege is meaningless.

But he is wrong. The fact is that the contents of attorney-client communications normally will be kept confidential. While the client must testify truthfully about underlying facts, he is not required to reveal *the content of his conversation* with his attorney. Any seasoned practicing lawyer knows that clients impart many matters to their attorneys besides "facts"—*e.g.*, their fears, doubts, speculations, emotions, theories, intentions, and the like. Such thoughts may never be revealed in testimony, and it generally is accepted that the lawyer must hold them confidential, whether the client lives or dies.

Moreover, while immunity is possible, there may be numerous reasons it will not be given by the government. And while an attorney in some circumstances must dis-

close a client's deception, this will happen rarely and even then disclosure will be limited.[11]

7. Independent Counsel argues that there is no "empirical support" for Petitioners' chilling effect argument (and then goes on to assert, with no support other than the opinion below, that changing the rule would have only a "minimal" effect on client candor). Br. at 15. Judge Tatel's response to this argument is conclusive: "because the Independent Counsel himself urges overturning the common law rule, and because that rule rests on the proposition that preserving the attorney-client privilege after the client's death is necessary to promote client disclosure, the Independent Counsel bears the responsibility of producing evidence to the contrary." Pet. App. 29a.[12]

In *Upjohn*, this Court, without citing "empirical support," drew on "reason and experience" to conclude that a proposed restriction on the privilege as applied to corporations would chill client candor, thus "discouraging the communication of relevant information" to the attorney and making it more difficult for the attorney "to formulate sound advice." 449 U.S. at 391-93. "Reason and experience" (the standard embodied in Rule 501) support the same conclusion here. Experience (including the experience of *amici's* many thousands of members) teaches that possible violations of the law, by friends and associates as well as the client, are a frequent subject of

[11] *See Model Rules of Professional Conduct*, Rule 3.3 anno.: "Within the bounds of the Rule prohibiting any affirmative misrepresentations, a lawyer need not disclose all the weaknesses in the client's case, nor must the lawyer correct every error of opposing counsel or the court."

[12] In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the argument was that the First Amendment required a news reporter's privilege because of an impermissible chilling effect, but the Court cited the lack of empirical evidence in declining to create such a privilege. 408 U.S. at 693-94. Similarly, a court should decline to denigrate a well-recognized privilege supported by reason and experience in the absence of compelling empirical evidence that the premise underlying the privilege is seriously flawed.

attorney-client conversations. Similar experience also teaches that people care about what happens after they die, because they, for example, write wills, establish trusts, endow chairs, establish foundations, buy life insurance and burial plots, and write memoirs. And while most people may not "anticipate [death] in an immediate or definite sense," [13] experience teaches that many elderly, severely ill or suicidal people do. Such people have a right to seek confidential legal advice. "Reason and experience" support the conclusion that they would not speak to an attorney in confidence if told their statements would be available to a prosecutor after death.

Work-Product Issue

As to the work product issue, Independent Counsel does not even attempt to justify the court of appeals' extraordinary holding that an attorney's notes of an initial interview are producible "under the ordinary Rule 26(b)(3) standard" because they must be presumed not to contain opinion work product, whose production demands a much higher standard. Pet. App. 13a-14a. Independent Counsel's reticence is understandable because there is a clear conflict between the majority's position that notes of an initial interview with a client may *never* constitute opinion work product and the large number of cases—including *Upjohn* and *Hickman*, which Independent Counsel does not even cite in this regard—which declare that attorney notes are entitled to heightened protection and may never be produced or only produced in the rarest of circumstances. This conflict counsels review by this Court, particularly because the ramifications of the majority's holding are harmful to the practice of law.

Independent Counsel does rely on two court of appeals decisions, but neither is pertinent. One case held that the government had made a sufficient showing of necessity, in light of the witness's death and other factors, to meet the *higher* standard of necessity applicable to opinion work

[13] *See* Independent Counsel Brief at 12, quoting 2 Mueller & Kirkpatrick, *Federal Evidence* § 197, at 380.

product. *In re Grand Jury Investigation*, 599 F.2d 1224, 1230-32 (3d Cir. 1979). The other case merely reflects a factual determination by the court (not based on a presumption) that the interview notes did not reflect the attorney's opinions. *In re John Doe Corp.*, 675 F.2d 482, 493 (2d Cir. 1982).

Independent Counsel also cites the Restatement's position that factual portions of interview notes may be produced, where redaction is feasible. *Restatement, supra*, § 138 comment c. Moreover, the court of appeals directed redaction of those portions of the notes that are "protected by . . . the work-product privilege." Pet. App. 14a. But this does not salvage the majority's opinion. Even if only the "facts" selected by Mr. Hamilton to record are produced upon an ordinary showing of need, that result still runs counter to the numerous opinions of this Court and other federal courts holding that such a product of an attorney's thought processes is entitled to heightened protection.[14]

Conclusion

The Petition for Certiorari should be granted.[15]

Respectfully submitted,

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February 27, 1998

[14] Petition at 18-19.

[15] Independent Counsel contends that this Court should deny certiorari to speed the conclusion of his investigations. It appears, however, that his investigations will not end until long after this Court, if it determines to review this case, decides it. Petitioners would not object to expedited treatment for this case.